

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**IN RE: CHOCOLATE : MDL DOCKET NO. 1935**  
**CONFECTIIONARY ANTITRUST : (Civil Action No. 1:08-MDL-**  
**LITIGATION : 1935)**  
\_\_\_\_\_  
: (Judge Conner)

**THIS DOCUMENT APPLIES TO: :**  
**ASSOCIATED WHOLESALE :**  
**GROCERS, INC.'S CASE :**

**ANSWER OF NESTLÉ U.S.A., INC. TO ASSOCIATED  
WHOLESALE GROCERS, INC.'S ORIGINAL COMPLAINT**

Defendant Nestlé U.S.A., Inc. (“Nestlé USA”) hereby answers Associated Wholesale Grocers, Inc.’s (“AWG”) Original Complaint (“Complaint”) as follows:

1. Nestlé USA denies the allegations contained in paragraph 1.
2. Nestlé USA denies the allegations contained in paragraph 2.
3. Nestlé USA admits that during the alleged relevant period, it sold

chocolate confectionary products to AWG in Kansas. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 and, therefore, denies them.

4. Nestlé USA denies the allegations contained in paragraph 4.
5. Nestlé USA admits that AWG purports to bring this action under Section 1 of the Sherman Act, 15 U.S.C. § 1, for treble damages pursuant to

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), and for permanent injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, and also for full consideration, treble damages, and permanent injunctive relief pursuant to the Kansas Restraint of Trade Act, K.S.A. 50-101, et seq. Nestlé USA denies that it has violated Section 1 of the Sherman Act, the Kansas Restraint of Trade Act, or any other law, and further denies that AWG is entitled to any relief.

6. Nestlé USA admits that AWG's Complaint purports to be an action for which this Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1337. Nestlé USA denies subject matter jurisdiction over alleged conduct that occurred outside the U.S.

7. Nestlé USA admits that it manufactures, distributes, advertises, and sells chocolate confectionary products in the United States. Nestlé USA denies the remaining allegations contained in paragraph 7.

8. Nestlé USA admits that it transacts business in the United States. Nestlé USA admits that it has manufactured, distributed, advertised, and sold chocolate confectionary products in the United States, including in Kansas. Nestlé USA denies the remaining allegations in paragraph 8.

9. Nestlé USA denies that it engaged in unlawful conduct. Nestlé USA admits that during the alleged relevant period, it sold chocolate confectionary products to AWG. Nestlé USA lacks knowledge or information sufficient to form

a belief as to the truth of the remaining allegations contained in paragraph 9 and, therefore, denies them.

10. To the extent that paragraph 10 requires an answer, Nestlé USA denies the allegations in paragraph 10.

11. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 and, therefore, denies them.

12. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 and, therefore, denies them.

13. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 and, therefore, denies them.

14. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 and, therefore, denies them.

15. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 and, therefore, denies them.

16. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 and, therefore, denies them.

17. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 and, therefore, denies them.

18. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 and, therefore, denies them.

19. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 and, therefore, denies them.

20. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 and, therefore, denies them.

21. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 and, therefore, denies them.

22. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 and, therefore, denies them.

23. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 and, therefore, denies them.

24. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 and, therefore, denies them.

25. Nestlé USA admits it is a Delaware corporation with its principal place of business in Glendale, California. Nestlé USA admits that it is a wholly-owned indirect subsidiary of Nestlé S.A. Nestlé USA admits that it manufactured, sold, and distributed candy products during the alleged relevant period. Nestlé USA admits that during the alleged relevant period, it sold chocolate confectionary products to AWG. Nestlé USA denies the remaining allegations contained in paragraph 25.

26. Nestlé USA denies the allegations contained in paragraph 26.

27. Nestlé USA denies that is received any additional income or that it is a party to the agreement alleged in the first sentence of paragraph 27. Nestlé USA

lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 27 and, therefore, denies them.

28. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 and, therefore, denies them.

29. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 and, therefore, denies them.

30. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 and, therefore, denies them.

31. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 and, therefore, denies them.

32. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 and, therefore, denies them.

33. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 and, therefore, denies them.

34. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 and, therefore, denies them.

35. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 and, therefore, denies them.

36. Nestlé USA admits that Nestlé S.A. is a Swiss company with its principle place of business in Vevey, Switzerland. Nestlé USA denies the remaining allegations contained in paragraph 36.

37. Nestlé USA admits that Nestlé Canada is a Canadian corporation with its principal place of business in North York, Ontario. Nestlé USA admits that Nestlé Canada is a partially owned subsidiary of Nestlé S.A. Nestlé USA denies the remaining allegations contained in paragraph 37.

38. Nestlé USA denies the allegations contained in paragraph 38.

39. Nestlé USA admits that paragraph 39 generally describes the origins and process of chocolate.

40. Nestlé USA admits that plaintiffs' purport to use the term "chocolate candy products" as defined in paragraph 40.

41. Nestlé USA denies the allegations contained in paragraph 41.

42. Nestlé USA denies the allegations contained in paragraph 42.

43. Nestlé USA denies the allegations contained in paragraph 43.

44. Nestlé USA denies the allegations contained in paragraph 44.

45. Nestlé USA denies the allegations contained in paragraph 45.

46. Nestlé USA denies the allegations contained in paragraph 46.

47. Nestlé USA denies the allegations contained in paragraph 47.

48. Nestlé USA admits that it sold and shipped chocolate candy in interstate commerce during the alleged relevant time period. Nestlé USA denies the remaining allegations contained in paragraph 48.

49. Nestlé USA denies the allegations contained in paragraph 49.

50. Nestlé USA denies the allegations contained in paragraph 50.

51. Nestlé USA denies the allegations contained in paragraph 51.

52. Nestlé USA denies the allegations contained in paragraph 52.

53. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 53 and, therefore, denies them.

54. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 and, therefore, denies them.

55. Nestlé USA admits that it increased list prices for certain chocolate confectionery products on or about December 12, 2002. Nestlé USA denies the remaining allegations contained in paragraph 55.

56. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 56 and, therefore, denies them.

57. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 57 and, therefore, denies them.

58. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 58 and, therefore, denies them.

59. Nestlé USA admits that it increased list prices for certain chocolate confectionery products on or about December 22, 2004. Nestlé USA denies the remaining allegations contained in paragraph 59.

60. Nestlé USA denies the allegations contained in paragraph 60.

61. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 61 and, therefore, denies them.

62. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 and, therefore, denies them.

63. Nestlé USA admits that it increased list prices for certain chocolate confectionery products on or about April 5, 2007. Nestlé USA denies the remaining allegations contained in paragraph 63.

64. Nestlé USA denies the allegations contained in paragraph 64.

65. Nestlé USA denies the allegations contained in paragraph 65.

66. Nestlé USA denies the allegations contained in paragraph 66.

67. Nestlé USA denies the allegations contained in paragraph 67.

68. Nestlé USA denies the allegations contained in paragraph 68.

69. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations related to the statistics cited from the U.S. Department of Commerce, the actions of the Hershey defendants, or the statements of Professor Madway in paragraph 69. Nestlé USA denies the remaining allegations contained in paragraph 69.

70. Nestlé USA denies the allegations contained in paragraph 70.

71. Nestlé USA denies the allegations contained in the first sentence of paragraph 71. Nestlé USA lacks knowledge or information sufficient to form a

belief as to the truth of the remaining allegations contained in paragraph 71 and, therefore, denies them.

72. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 72 and, therefore, denies them.

73. Nestlé USA denies the allegations contained in paragraph 73.

74. Nestlé USA denies the allegations contained in paragraph 74.

75. Nestlé USA denies the allegations contained in paragraph 75.

76. Nestlé USA admits that there are numerous buyers of chocolate candy and that it sells chocolate candy products to the purchasers listed in paragraph 76. Nestlé USA denies the remaining allegations contained in paragraph 76.

77. Nestlé USA denies the allegations contained in paragraph 77.

78. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 78 and, therefore, denies them.

79. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 79 and, therefore, denies them.

80. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 80 and, therefore, denies them.

81. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 81 and, therefore, denies them.

82. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 82 and, therefore, denies them.

83. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 83 and, therefore, denies them.

84. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 84 and, therefore, denies them.

85. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 85 and, therefore, denies them.

86. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 86 and, therefore, denies them.

87. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 87 and, therefore, denies them.

88. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 88 and, therefore, denies them.

89. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 89 and, therefore, denies them.

90. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 90 and, therefore, denies them.

91. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 91 and, therefore, denies them.

92. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 92 and, therefore, denies them.

93. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 93 and, therefore, denies them.

94. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 94 and, therefore, denies them.

95. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 95 and, therefore, denies them.

96. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 96 and, therefore, denies them.

97. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 97 and, therefore, denies them.

98. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 98 and, therefore, denies them.

99. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 99 and, therefore, denies them.

100. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 100 and, therefore, denies them.

101. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 101 and, therefore, denies them.

102. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 102 and, therefore, denies them.

103. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 103 and, therefore, denies them.

104. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 104 and, therefore, denies them.

105. Nestlé USA denies the allegations contained in paragraph 105.

106. Nestlé USA denies the allegations contained in paragraph 106.

107. Nestlé USA denies the allegations contained in paragraph 107.

108. Nestlé USA denies the allegations contained in paragraph 108.

109. Nestlé USA denies the allegations contained in paragraph 109.

110. Nestlé USA denies the allegations contained in paragraph 110.

111. Nestlé USA denies the allegations contained in paragraph 111.

112. Nestlé USA denies the allegations contained in paragraph 112.

113. Nestlé USA denies the allegations contained in paragraph 113.

114. Nestlé USA denies the allegations contained in paragraph 114.

115. Nestlé USA denies the allegations contained in paragraph 115.

116. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 116 and, therefore, denies them.

117. Paragraph 117 purports to selectively quote from or paraphrase a December 21, 2007 Wall Street Journal article and also a statement from Nestlé USA spokeswoman Laurie MacDonald, both of which speak for themselves.

Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 117 and, therefore, denies them.

118. Paragraph 118 purports to selectively quote from or paraphrase an April 2008 Wall Street Journal article, which speaks for itself. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 118 and, therefore, denies them.

119. Paragraph 119 purports to selectively quote from or paraphrase a February 11, 2008 New York Times article and also a February 20, 2008 Associated Press article, both of which speak for themselves. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 119 and, therefore, denies them.

120. Nestlé USA denies that it engaged in unlawful conduct. Nestlé USA admits that multiple complaints have been filed in this case, and those complaints speak for themselves.

121. Nestlé USA admits the allegations contained in paragraph 121.

122. Paragraph 122 purports to selectively quote or paraphrase the Court's March 4, 2009 Order, which speaks for itself. Nestlé USA denies the remaining allegations contained in paragraph 122.

123. Paragraph 123 purports to selectively quote from or paraphrase the Court's August 11, 2009 Order, which speaks for itself. Nestlé USA denies the remaining allegations contained in paragraph 123.

124. Paragraph 124 purports to paraphrase documents on the MDL docket concerning the settlement between certain plaintiffs in the MDL action and Cadbury Holdings L.t.d., Cadbury plc, and Cadbury Adams Canada, Inc., and these documents speak for themselves. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 124 and, therefore, denies them.

125. Nestlé USA denies the allegations contained in paragraph 125.

126. Nestlé USA denies the allegations contained in paragraph 126.

127. Nestlé USA denies that it engaged in any unlawful conduct. Nestlé USA lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 127 and, therefore, denies them.

128. Nestlé USA denies the allegations contained in paragraph 128.

129. Nestlé USA denies the allegations contained in paragraph 129.

130. Nestlé USA incorporates and restates its answers to the allegations in paragraphs 1-130.

131. Nestlé USA denies the allegations contained in paragraph 131.

132. Nestlé USA denies the allegations contained in paragraph 132.

133. Nestlé USA denies the allegations contained in paragraph 133.

134. Nestlé USA denies the allegations contained in paragraph 134.

135. Nestlé USA denies the allegations contained in paragraph 135.

136. Nestlé USA denies the allegations contained in paragraph 136.

137. Nestlé USA denies the allegations contained in paragraph 137.

138. Nestlé USA denies the allegations contained in paragraph 138.

139. Nestlé USA incorporates and restates its answers to the allegations in paragraphs 1-138.

140. Nestlé USA denies the allegations contained in paragraph 140.

141. Nestlé USA denies the allegations contained in paragraph 141.

142. Nestlé USA denies the allegations contained in paragraph 142.

143. Nestlé USA denies the allegations contained in paragraph 143.

144. Nestlé USA denies the allegations contained in paragraph 144.

145. Nestlé USA denies the allegations contained in paragraph 145.

146. Nestlé USA denies the allegations contained in paragraph 146.

147. Nestlé USA denies the allegations contained in paragraph 147.

148. Nestlé USA denies the allegations contained in paragraph 148.

149. Nestlé USA denies the allegations contained in paragraph 149.

150. Nestlé USA denies the allegations contained in paragraph 150.

## **AFFIRMATIVE DEFENSES**

Nestlé USA asserts the following affirmative defenses without in any way conceding that AWG does not have to prove each and every element of its claim.

### **FIRST AFFIRMATIVE DEFENSE**

AWG's claims are barred for failure to state a claim upon which relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

AWG lacks standing to seek relief against or from Nestlé USA.

### **THIRD AFFIRMATIVE DEFENSE**

The Complaint is barred in whole or in part by the doctrine of laches.

### **FOURTH AFFIRMATIVE DEFENSE**

The Complaint is barred in whole or in part by the doctrine of waiver and/or estoppel.

### **FIFTH AFFIRMATIVE DEFENSE**

AWG's claims are barred in whole or in part by the applicable statute of limitations.

### **SIXTH AFFIRMATIVE DEFENSE**

Recovery on the Complaint, and the purported cause of action therein, is barred in whole or in part by AWG's failure to mitigate its alleged damages.

### **SEVENTH AFFIRMATIVE DEFENSE**

The injuries and damages alleged by AWG do not constitute legally cognizable antitrust injuries.

### **EIGHTH AFFIRMATIVE DEFENSE**

The injuries and damages alleged by AWG were not caused in fact by any conduct or act of Nestlé USA.

### **NINTH AFFIRMATIVE DEFENSE**

The injuries and damages alleged by AWG were not proximately caused by any conduct or act of Nestlé USA.

### **TENTH AFFIRMATIVE DEFENSE**

The Complaint is barred on the ground that the acts complained of, to the extent they occurred, were procompetitive in nature, and done solely to promote, encourage, and increase competition. Accordingly, Nestlé USA's conduct was reasonable and justified.

### **ELEVENTH AFFIRMATIVE DEFENSE**

AWG has not alleged or sustained any irreparable harm or injury, and therefore is not entitled to any injunctive relief.

### **TWELFTH AFFIRMATIVE DEFENSE**

AWG's alleged damages, if any, are speculative and impossible to ascertain.

### **THIRTEENTH AFFIRMATIVE DEFENSE**

AWG failed to plead fraudulent concealment with particularity, as required by Fed . R. Civ. P. 9(b).

### **FOURTEENTH AFFIRMATIVE DEFENSE**

The Kansas Restraint of Trade Act is unconstitutional in whole or in part.

### **FIFTEENTH AFFIRMATIVE DEFENSE**

Nestlé USA adopts by reference any defense, not otherwise expressly set forth herein, that is pleaded by any other defendant in this action that may be applicable to Nestlé USA.

**WHEREFORE**, Defendant Nestlé USA respectfully requests that this Court dismiss the Complaint with prejudice and enter judgment in favor of Nestlé USA, together with an award of costs, expenses, attorneys' fees, and such other further relief as the Court deems just and proper.

Dated: November 2, 2012

Respectfully submitted,

By: /s/Michael A. Finio

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 2, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all Counsel of Record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/Adam L. Hudes

**Counsel for Nestlé U.S.A., Inc.**